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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

COUNTY OF LOS ANGELES,

Petitioner,

v.

CHARLES L. JORDAN,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

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SUMMARY OF ARGUMENT

I. The Ninth Circuit had a factual basis for determining that a "live controversy" continues to exist. First, the Court of Appeals recognized that Respondent continues to challenge the practices alleged to violate Title VII because the new guidelines adopted by Petitioner while this case was on appeal do not eliminate the practices. Second, individual members of the class are entitled on remand to "make whole" relief for being denied jobs under the previous guidelines.

II. The Ninth Circuit found the "personal stake" requirement to be met because the named plaintiff has a continuing stake, as a current applicant and as a future applicant, to have the challenged practices eliminated. Otherwise, his criminal records will continue to exclude him from employment by Petitioner. The "personal stake" requirement also is satisfied by the named plaintiff's personal stake in the class certification claim. United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402-404 (1980). Finally, three individuals who have been affected by the challenged practices have sought to intervene.

III. Contrary to Petitioner's assertion, the Ninth Circuit's policy

of considering the remedial purpose of Title VII when assessing a case under Rule 23 of the Federal Rules of Civil Procedure is not in conflict with the requirement that the Rule 23(a) prerequisites be met. In fact, the Circuit Court specifically held that Respondent has made the requisite showing for each prong of Rule 23(a).

IV. The Ninth Circuit did not apply an incorrect standard for review because there were no questions of fact to be resolved. Rather, the class certification issue was litigated solely on stipulated facts. Hence, the recent decision in Pullman-Standard v. Swint, ___ U.S. ___, 50 U.S.L.W. 4425 (1982) has no application to this case.

ARGUMENT

I

The Ninth Circuit Had A Factual Basis For Finding A "Live Controversy" To Exist

The Ninth Circuit dealt at Section II.A. of its opinion with Petitioner's argument, repeated in this Court, that Petitioner's adoption of new guidelines for the consideration of an employment applicant's criminal record while this case was on appeal extinguished any "live controversy" between the plaintiff class and Petitioner. The Ninth Circuit correctly recognized that the following facts indicate a "live controversy" does continue to exist:

(a) Respondent intends to

challenge Petitioner's practices under the new guidelines because Petitioner still will consider an applicant's juvenile and marijuana-related conviction records and the new guidelines merely reiterate the previous arrest record "policy" which was not adhered to in practice, Petitioner's Appendix A, p. 6; and

(b) Members of the putative class, exemplified by several who have sought to intervene, still have "live" claims for "make whole" relief for having been denied employment by the challenged employment practices, Petitioner's Appendix A, p. 5.

Petitioner claims that reliance on these facts by the Ninth Circuit is an "unwarranted expansion" of the holding in United States Parole

Comm'n v. Geraghty, 445 U.S. 388 (1980). Petitioner would have Geraghty stand for the proposition that a "live controversy" exists only where there are members of the class who are being subjected at the time of the appeal to the identical practice or set of guidelines which affected the name plaintiff. While these may have been the facts that established a "live controversy" in Geraghty, the case by no means indicated that this factual pattern was essential for a "live controversy" to exist.

Respondent has two responses to this argument. First, the instant case does fit the factual pattern in Geraghty in that Respondent claims members of the class are still being subjected to the practices challenged

in this lawsuit even though Petitioner has adopted a new set of procedural guidelines. Petitioner would have this Court believe that Respondent brought this lawsuit to challenge a set of guidelines which now have been altered. This is a mischaracterization of Respondent's lawsuit. Respondent has alleged that Petitioner has violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e et seq. ("Title VII") by its practice of denying employment to applicants based on certain "soft" criminal records (arrests, juvenile offenses and marijuana-related convictions) which have a disparate impact on blacks and have no demonstrable relationship to later job performance. Even under Petitioner's

"new" guidelines, Petitioner will be continuing its practice of considering these same criminal records in deciding whether or not to deny employment to applicants.[1]

Second, this case has an additional fact establishing a "live controversy" which did not exist in Geraghty: the class members affected by the challenged practice are entitled to individual "make whole" relief as well as an injunction against the practice. The Geraghty

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[1]Petitioner makes curious references at pages 9 and 10 of the Petition to "undispute evidence in the record" and "absolutely no evidence in the record" when discussing its new procedures. These procedures or guidelines, however, were adopted while this case was on appeal, have been subject to no discovery by Respondent and have not been the subject of an evidentiary hearing. The only evidence in the [Footnote continued on next page.]

case was a constitutional challenge which sought no monetary or other relief for the class members while the instant case is brought pursuant to Title VII under which persons affected by a statutory violation are entitled to be made whole by the employer. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

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[1] [Continued from previous page.] "record" concerning these new procedures is a self-serving declaration by one of Petitioner's employees. Petitioner's Appendix E.

II

The Ninth Circuit Found Respondent To Have A "Personal Stake" In The Lawsuit In His Status As A Current And Future Applicant

Petitioner bases its argument that Respondent has no "personal stake" in this lawsuit on the claim that Respondent settled all of his claims and abandoned the class after the denial of class certification. This characterization of the settlement is inaccurate.

The Ninth Circuit correctly recognized that Respondent merely settled his claims for "make whole" relief for his denial of employment on September 19, 1973 but specifically retained his interest in appealing the denial of class

certification and in obtaining injunctive relief on behalf of the putative class with respect to the challenged practices. Petitoner's Appendix A, pp. 7-8, n.4. The Ninth Circuit further recognized that Respondent's "personal stake" grew out of his status both as an actual current applicant and as a potential future applicant for employment with Petitioner and hence a person who has continued to be subject to the challenged practices. Petitioner's Appendix A, p. 9.

The Supreme Court in Geraghty did not require even a direct "personal stake" as possessed by Respondent as a current and future applicant. Rather, it was recognized that a name plaintiff in a class action has a "personal stake" in the

class certification claim which is independent of the plaintiff's personal claim on the merits. 445 U.S. at 402-404. Respondent in this case clearly retained this interest in class certification while settling his individual claim by the provision in the Stipulation to Entry of Final Judgment re Individual Claims of Charles L. Jordan which states:

> "WHEREAS, all parties understand that the settlement of Plaintiff Jordan's individual claims will not in any way affect the class action aspects of this case ...."

This intent is further shown by Respondent's decision to settle his case by the entry of a final judgment rather than by a dismissal of the action and by his immediate filing of

a notice of appeal of the denial of class certification.

These facts distinguish the instant case from the case contemplated by the Court at footnote 10 in Geraghty. This footnote expressly leaves open the question "whether a named plaintiff who settles the individual claim after denial of class certification ... may appeal from the adverse ruling on class certification." Respondent submits that there is a major difference between the facts of this case and the case where named plaintiffs settle their individual claims and agree to a dismissal of the action. It is this later situation which was present by the facts in the case referenced in this footnote, United Airlines, Inc. v.

McDonald, 432 U.S. 385, 393-94, and n.14 (1977).

There is one final factual situation presented by the instant case which takes it outside the issues discussed in Geraghty. Here, there are three members of the class who have sought to intervene and to pursue the appeal of the denial of class certification. See Petitioner's Appendix F. These three individuals have a "personal stake" in the outcome of this lawsuit both with respect to their individual claims for make whole relief and with respect to class-wide injunctive relief. Even the dissenter in Ninth Circuit would have remanded the case to allow these class members to intervene.

III

There Is No Conflict Between The Ninth Circuit's Approach To Rule 23(a) And The Approach Adopted By The Supreme Court And Other Circuits

Petitioner argues at Section IV of its Petition that the Ninth Circuit's opinion in Gay v. Waiters and Dairy Lunchmen's Union, 549 F.2d 1330 (9th Cir. 1977), relied upon by the Circuit Court in the instant case, is in conflict with decisions in other circuits and the Supreme Court's decision in East Texas Motor Freight System, Inc. v. Rodriquez, 431 U.S. 395 (1977). Petitioner contends that the ruling in Gay that Rule 23 must be interpreted and applied in a way that will not undermine the broad remedial purpose

of Title VII conflicts with the requirement that the Rule 23(a) prerequisites must be met. These are not conflicting principles.

The Ninth Circuit never has held that the Rule 23(a) requirements need not be met. In Gay, the Ninth Circuit held that the district court applied rule 23(a)(1) in an "unduly restrictive manner" but then remanded the case for re-determination of the Rule 23(a) requirements. 549 F.2d at 1334. In the instant case, the Ninth Circuit referred to Rule 23(a) as setting forth "mandatory prerequisites" and quoted Rule 23(a) in full at footnote 6. Petitioner's Appendix A, p. 10. The Circuit Court then went on to deal separately with each subsection of Rule 23(a). Petitioner's Appendix A, pp. 11-20.

Hence, the conflict Petitioner seeks to establish is illusory.

IV

There Are No Questions Of Fact To Which An "Abuse of Discretion" Standard Would Be Applicable

Petitioner's final argument at Section V of its Petition that the Ninth Circuit applied the wrong standard for review has no merit. Petitioner relies on the recent decision in Pullman-Standard v. Swint, ___ U.S. ___, 50 U.S.L.W. 4425 (1982) and argues that an "abuse of discretion" standard should have been applied to factual issues in reviewing the district court's Rule 23 rulings.

Unlike the Pullman-Standard

case, however, the district court's rulings in the instant case are not findings of fact based on a contested factual record. In fact, the motion for class certification below was based upon a Stipulation of Fact Relevant to the Existence of a Class, a Stipulation of Uncontested Facts for Purposes of the Parties' Cross-Motion for Summary Judgment and a declaration of Respondent's counsel. Petitioner's opposition presented absolutely no facts, by declaration or otherwise. Hence, there were no purely factual issues before the district court.

Rather, the Ninth Circuit in this case addressed issues that were mixed questions of law and fact: the only questions were whether the uncontested facts are relevant to a

Rule 23(a) requirement and whether the uncontested facts are sufficient to meet a Rule 23(a) requirement. With respect to such issues, the opinion in Pullman-Standard stated at footnote 19 that:

> We need not, therefore, address the much-mooted issue of the applicability of the Rule 52(a) standard to mixed questions of law and fact -- i.e., questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated. * * * There is also support in decisions of this Court for the proposition that conclusions on mixed questions of law and fact are independently reviewable by an appellate court ...."

CONCLUSION

For the reasons stated above, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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